Appendix.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14642

UNITED STATES OF AMERICA,
Appellant

v.

LEWES DAIRY, INC.

No. 14643

LEWES DAIRY, INC. AND CLIFFORD S. OTT AND JAMES M. FAULKNER, INDIVIDUALLY AND AS CO-PARTNERS DOING BUSINESS AS HOLLYBROOK DAIRY, A CO-PARTNERSHIP

v.

ORVILLE L. FREEMAN, AS SECRETARY OF AGRICULTURE,
Appellant

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Argued April 24, 1964

Before KALODNER, FORMAN and SMITH, *Circuit Judges*

OPINION OF THE COURT

(Filed October 6, 1964)

By KALODNER, *Circuit Judge*

The United States instituted a proceeding in the District Court against Lewes Dairy, Inc., to enforce compli-

ance with the provisions of the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. 601 *et seq.*, and of the Marketing Order (Order No. 127, later renumbered No. 16) regulating the handling of milk in the Upper Chesapeake Bay, Maryland marketing area (7 C.F.R. Part 1027).[1]

The District Court entered on May 21, 1963, an order requiring the defendant to pay into the registry of the court arrearages due under the Marketing Order for the period from February, 1960, to December, 1962, in the amount of $92,956.65, and also to pay into the registry of the court amounts currently due under the Marketing Order.

In the interim, Lewes Dairy, Inc., and Clifford S. Ott and James M. Faulkner, doing business as Hollybrook Dairy, a co-partnership, instituted proceedings in the District Court against the Secretary of Agriculture, pursuant to the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. 608c (15)(B), to review the denial of petitions for relief from Marketing Order No. 127 addressed to the Secretary pursuant to Section 608c (15)(A) of the Act.[2]

In this second proceeding, the District Court, on motions for summary judgment filed by the plaintiffs and by the Secretary, upon "Findings of Fact" and "Conclusions of Law", entered its order holding invalid Marketing Order No. 127 as it applied to the plaintiffs. The Secretary has appealed from this order, at our No. 14643.

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1. The Secretary officially promulgated the Order on December 31, 1959, 24 F.R. 11071. The Order became effective for reporting purposes on January 1, 1960, and for purposes of minimum price payments on February 1, 1960.

2. Mills Dairy Products Company and several other milk companies also filed petitions with the Secretary seeking administrative relief. From the denial of such relief, proceedings for judicial review were instituted in the United States District Court for the District of Maryland. The validity of marketing Order No. 127 was sustained: United States v. Mills, 315 F. 2d 828 (4 Cir. 1963), cert. denied *sub nom.* Willows Farms Dairy, Inc. v. Freeman, 374 U.S. 832.

The District Court, on July 16, 1963, entered an Order in the earlier enforcement proceeding so as to relieve Lewes Dairy, Inc. of the obligation of paying, as provided in its Order of May 21, 1963, the $92,956.65 arrearages into the registry of the court, pending appeal. The later Order provided that in the event this Court should reverse the District Court's Order in the review proceeding and remand for further administrative proceedings, the obligation to pay the arrearages should be deferred until sixty days after a final determination of the new proceeding.[3] The United States has appealed at our No. 14642 from this July 16, 1963 Order.

With respect to the review proceeding (appealed at No. 14643), which we take up first, the ultimate issue is whether the Milk Marketing Order involved establishes an economic trade barrier inconsistent with the provisions of Section 608c (5)(G)[4] of the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. § 608c (5)(G). See Lehigh Valley Cooperative Farmers, Inc. v. United States, 370 U.S. 76 (1962). However, the Secretary preliminarily asserts that the issue was not developed in the administrative proceeding and therefore contends that the cause should be remanded for further administrative proceedings, unless, of course, this Court should determine

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3. It would appear that Hollybrook is no longer distributing milk in the Upper Chesapeake Bay Marketing Area, having sold the business during the course of this litigation. Proceeds of the sale were deposited in the District Court to cover a portion of Hollybrook's unpaid obligation under the Marketing Order. The purchasing company is complying with the Order. The District Court ordered the deposited funds retained in its registry pending the determination of the appeal in the "review" action. The United States has not appealed from this order entered in the enforcement action against Hollybrook.

4. "No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States."

as a matter of law that the Milk Marketing Order is valid as applied. In this connection the Secretary contends that the District Court exceeded its authority in finding facts and in supplanting the Secretary in the exercise of functions initially committed to him.

Since we are in agreement with the preliminary assertion of the Secretary, an abbreviated statement of the underlying facts will suffice.

The background of milk regulation and the operation of a Milk Marketing Order are set forth in United States v. Rock Royal Co-operative, Inc., 307 U.S. 533 (1939). Reference to that decision saves repetition. Moreover, the particular Milk Marketing Order here involved is discussed in specific detail in United States v. Mills, 315 F. 2d 828, 831 (4th Cir. 1963), cert. den. *sub nom.* Willow Farms Dairy, Inc. v. Freeman, 374 U.S. 832, the relevance of which is made apparent by footnote 2, *supra.* Again, reference to that decision saves repetition.

Lewes Dairy, Inc. and Hollybrook Dairy are milk companies with plants located in Delaware but which market milk in the Upper Chesapeake Bay Marketing Area, the regulated area encompassed by Milk Marketing Order No. 127. Under that Order, sales of fluid milk within the marketing area, rather than plant location, determine whether a milk company is to be regulated. The sales of Lewes Dairy, Inc. and Hollybrook Dairy made them "pool plants" subject to full regulation under the Upper Chesapeake Bay Marketing Order. Lewes Dairy, Inc., Hollybrook Dairy, and others, refused to comply with the Milk Marketing Order (as a result of which the United States commenced the enforcement proceeding already referred to). The dairies jointly filed petitions with the Secretary seeking administrative relief on broadly stated claims. Upon denial, judicial review on equally broadly stated claims was sought below. However, between the denial of administrative relief by the Secretary of Agriculture and the commencement of the judicial review proceeding in

the court below, the United States Supreme Court handed down its decision in *Lehigh Valley*. The plaintiffs contend that they then merely "sharpened" their attack upon the validity of the Marketing Order in terms of that decision, which they also urge overruled, in effect, the decision of this Court in Titusville Dairy Products Co. v. Brannan, 176 F. 2d 332 (1949), cert. denied 338 U.S. 905.

The gravamen of Lewes Dairy's position in the court below rests upon the fact that it did a portion of its business outside the Upper Chesapeake Bay Marketing Area, in Delaware, where it was allegedly in competition with unregulated milk companies, which, according to Lewes Dairy, could obtain their milk supplies at lower cost than the minimum prices to which the Milk Marketing Order subjected Lewes Dairy on all its milk purchases. This, Lewes Dairy contends, gave its competitors an advantage. The Milk Marketing Order's provisions, it is not disputed, made Lewes Dairy a "fully regulated" company, even though some of its sales were not within the marketing area, so that it was required to pay minimum prices on all its milk purchases without regard to where its milk was sold. This, Lewes Dairy contends, created a "trade barrier" not permitted under Section 608c (5)(G), as interpreted by *Lehigh Valley*.

Motions for summary judgment were filed in the Court below first by the Secretary and then by Lewes Dairy. Without regard to other issues which had been raised before the Secretary and in the complaint for review in the District Court (as to which see *United States v. Mills, supra*) the District Court made "Findings of Fact" and stated "Conclusions of Law",[5] although the Secretary op-

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5. Relevant here are the following "Findings of Fact":

"6. Lewes disposes of more than 10% of its milk as Class I milk into the marketing area, and is thus a Handler as defined in the Order and is subject to the Order's price regulations.

7. Lewes sells all of its milk at a Class I utilization, and thus pays into the Producer-Settlement Fund the difference between

posed Lewes Dairy's motion on the grounds reasserted here insofar as the "trade barrier" issue is concerned.

(5 continued)
the established blend price and the Class I price designated in the Order.

8. Lewes disposes of between 35% and 45% of all its milk in the marketing area covered by Milk Order No. 16.

9. Under the Order, Lewes must contribute to the Producer-Settlement Fund, the Administrative Assessment Fund, and the Marketing Services Fund based not only on the 35%-45% of its total volume (that part shipped into the marketing area), but on 100% of its volume.

10. The requirement of Lewes to pay the difference between the blend price and the Class I price into the Producer-Settlement Fund on milk not shipped into the marketing area places it at a competitive disadvantage with non-regulated Handlers in Delaware (those who ship less than 10% of its milk into the marketing area).

11. Lewes Dairy is discouraged from shipping more than 10% of its milk into the marketing area since such volume of shipment subjects it to the full regulation and consequent competitive disadvantage in Delaware.

12. A requirement that Lewes Dairy contribute to the various funds only on the basis of the amount of Class I milk it actually ships into the marketing area would not put it at a competitive advantage over Handlers who ship all of their supply into the marketing area.

13. A requirement that Lewes Dairy contribute to the various funds only on the basis of the amount of Class I milk it actually ships into the marketing area would not destroy the purpose of the Order, which is to guarantee a uniform blend price to producers of milk finding its way into the geographical area which the Administrator *has chosen to regulate.*"

Relevant here are the following "Conclusions of Law"

"2. The above quoted section [§ 608c(5)(G)] prohibits the Secretary of Agriculture from setting up any kind of economic trade barrier through his marketing area price regulations. Lehigh Valley Co-operative Farmers, Inc. v. U.S., 370 U.S. 76, 97 (1962). In light of the *Lehigh Valley* decision, Titusville Dairy Products Co. v. Brannon, 176 F. 2d 332 (3d Cir. 1949) is not authority permitting regulation of milk prices on milk not sold in the marketing area.

3. Lewes Dairy is discouraged from shipping more than 10% of its milk into the marketing area since such volume of

In this instance, we have no hesitancy in concluding that the District Court's so-called "Findings of Fact" concerning the competitive effects of the Milk Marketing Order on the particular dairies here involved are unsupportable either as a proper exercise by the District Court of the summary judgment procedure under Rule 56, Federal Rules of Civil Procedure, or as a proper function of the District Court under the review procedure established by the Act pursuant to which this proceeding was commenced.[6] See United States v. Ruzicka, 329 U.S. 287 (1946).

(5 continued)

shipment subjects it to the full regulation and consequent competitive disadvantage in Delaware.

4. To the extent that Lewes is required to pay into the various funds on the basis of milk it does not dispose of in the marketing area chosen to be regulated by the Administrator, Order No. 16 imposes a trade barrier between Delaware and the marketing area.

5. Whether or not the question of the Order's imposition of a trade barrier was raised before or decided in the administrative proceeding below, justice requires that this question be decided in this review proceeding without remand for further administrative hearings.

6. Order No. 16 is not in accordance with law to the extent that it regulates prices to be paid by Handlers on milk not shipped into the defined marketing area."

The Court also made the findings and conclusions applicable to Hollybrook Dairy except to the extent of the percentage of Class I milk, over and above 10% previously delivered by Hollybrook Dairy into the marketing area.

6. 7 U.S.C. 608c(15).

"(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal

Without recounting the arguments of the parties on the "trade barrier" issue, we are satisfied that they are founded essentially upon factual assertions which are not evidentially developed in the record, or upon any determination of the facts made by the Secretary of Agriculture the correctness of which, when made, would be reviewed in this proceeding under § 608c (15)(B). As stated in United States v. Ruzicka, *supra,* 329 U.S., at 294:

> "It is suggested that Congress did not authorize a district court to enforce an order not 'in accordance with law.' The short answer to this rather dialectic point is that whether such an order is or is not in accordance with law is not a question that brings its own immediate answer, or even an answer which it is the familiar, everyday business of courts to find. Congress has provided a special procedure for ascertaining whether such an order is or is not in accordance with law. The questions are not, or may not be, abstract questions of law. Even when they are formulated in constitutional terms, they are questions of law arising out of, or entwined with, factors that call for understanding of the milk industry. And so Congress has provided that the remedy in the first instance must be sought from the Secretary of Agriculture. It is on the basis of this ruling, and of the elucidation which he would presumably give to his ruling, that resort may be had to the courts."

(6 continued)

place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. * * *"

We take the foregoing as expressing the spirit pervading these proceedings. Certainly the social and commercial significance of a Milk Marketing Order, and the legislative policy committing the initial determinations to the Secretary and limiting the judicial review, do not permit the courts to make initial findings of fact and to exercise the authority vested in the Secretary. Nor do we think that semantics or legal technicalities should be indulged in so as to frustrate achievement of intended justice.

In this case, the claims to invalidity, earlier stated, may be read broadly enough to include the "trade barrier" issue. Certainly the issue is significant, and is so regarded by the Secretary. As a legal proposition within the apparent or professed factual framework of this case, it is not one of simple solution to be decided upon abstractions or assumptions. And, whether our decision in *Titusville* is controlling, or (as held by the District Court) is overruled by *Lehigh Valley*, especially in view of the latter's differentiation of "fully regulated" milk companies (370 U.S. at 99), is not to be decided upon a record without evidence to sustain the factual realities of the legal arguments directed toward the issue brought into focus by the subsequent decision of importance (*Lehigh Valley*), upon which the Secretary has not had an opportunity to exercise his statutory powers and expertise.

Accordingly, we conclude that the Order of the District Court in the review proceedings (No. 14643) must be vacated and the cause remanded for further administrative consideration and disposition.

With respect to the enforcement proceedings (No. 14642), the United States has acceded to the May 21, 1963 Order that the arrearages under the Milk Marketing Order be paid into the registry of the court according to a schedule determined by the District Court following a hearing. However, it objects to the July 16, 1963 Order which, as already stated, relieved the defendant of its obligation to pay the arrearages pending appeal and, thereafter, pend-

ing determination of the further administrative proceedings which, pursuant to this Opinion, will ensue. Considering, as we must, the spirit of the specific provisions of the Act,[7] we agree that such protracted delay is not justified and that the challenged Order of the District Court staying payment of the arrearages as aforesaid must be vacated. Since the time for making payment as provided by the earlier Order of May 21, 1963 is past, the cause must be remanded to the District Court with instruction to direct expeditious payment of the arrearages into the registry of the Court.

For the reasons stated the Order of the District Court on appeal at our No. 14642 will be vacated and the cause remanded with instruction to direct expeditious payment of the arrearages into the registry of the Court, and its Order on appeal at our No. 14643 will be vacated and the cause remanded for further administrative proceedings consistent with this Opinion.

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7. 7 U.S.C. 608c(15)(B)

"* * * The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15)."

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 14,642.

UNITED STATES OF AMERICA,
Appellant,

v.

LEWES DAIRY, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE.

Present: KALODNER, FORMAN and SMITH, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the District Court, filed July 16, 1963, in this case be, and the same is hereby vacated and the cause remanded with instruction to direct expeditious payment of the arrearages into the registry of that Court.

ATTEST: IDA O. CRESKOFF,

October 6, 1964. Clerk.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 14,643.

LEWES DAIRY, INC. AND CLIFFORD S. OTT AND JAMES M. FAULKNER, INDIVIDUALLY AND AS CO-PARTNERS DOING BUSINESS AS HOLLYBROOK DAIRY, A CO-PARTNERSHIP

v.

ORVILLE L. FREEMAN, AS SECRETARY OF AGRICULTURE, *Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE.

Present: KALODNER, FORMAN and SMITH, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the District Court, filed July 12, 1963, in this case be, and the same is hereby vacated and the cause remanded for further administrative proceedings consistent with the opinion of this Court.

ATTEST: IDA O. CRESKOFF,

October 6, 1964. Clerk.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 14,642.

UNITED STATES OF AMERICA,
Appellant,

v.

LEWES DAIRY, INC.

No. 14,643.

LEWES DAIRY, INC., AND C. S. OTT ET AL.,
D/B/A HOLLYBROOK DAIRY

v.

ORVILLE L. FREEMAN, SECRETARY OF AGRICULTURE,
Appellant.

STIPULATION.

Counsel for appellants United States of America and the Secretary of Agriculture and for appellee Lewes Dairy, Inc. hereby stipulate that, if the Court will approve, this Court's mandates in these cases be stayed until November 13, 1964, and if by that date the Clerk of this Court shall have received a certificate from the Clerk of the United States District Court for the District of Delaware that Lewes Dairy, Inc. has filed with him a stipulation in its Civil Action No. 2191, in the form hereinafter prescribed, and has deposited in the Registry of that Court

the sum of $40,000, pursuant to the stipulation filed with him, the mandates herein will automatically be further stayed until November 25, 1964, and if by that latter date the Clerk of this Court shall have received a certificate from the Clerk of the United States Supreme Court that Lewes Dairy, Inc. has filed therein a petition for a writ of certiorari in these cases, with the required accompanying papers, the judgments herein will automatically be further stayed until the conclusion of such certiorari proceedings or until Lewes Dairy, Inc. fails to make payment into the Registry of the Delaware District Court as stipulated, and this Court is so advised by a writing of counsel for the United States, whichever is earlier.

The stipulation above referred to is that Lewes Dairy, Inc. shall deposit in the Registry of the United States District Court for the District of Delaware the sum of $92,956.65, which is referred to in paragraph 1 of the order of that District Court dated May 21, 1963, in its Civil Action No. 2191 (and which plaintiff in that action claims is the obligation of Lewes Dairy, Inc. to the producer settlement fund, the administrative assessment fund, and the marketing services fund under federal Milk Marketing Order No. 16 for milk received for the period beginning February 1960 to and including the month of December 1962), to be held in the Registry subject to the further order of the Court in its Civil Action No. 2191—all according to the following schedule:

1. An installment of $40,000 on such sum is to be so deposited by November 13, 1964;

2. An additional installment of $20,000 on such sum is to be so deposited by December 14, 1964; and,

3. A further installment of $10,000 on such sum is to be so deposited by January 14, 1965, and by the 14th day of each month thereafter until the total sum of $92,956.65 shall have been so deposited.

This stipulation is made with the understanding that Lewes Dairy, Inc. does not hereby admit any legal liability for the aforesaid sum and that the deposits hereby required will be made by it under protest. This stipulation is also made with the understanding that it is entered without prejudice to the right of either party hereafter to take such position as it wishes with regard to the right of Lewes Dairy, Inc. to withdraw interest that may be earned upon the aforesaid deposits after they are made.

/s/ ALEXANDER GREENFELD,
Attorney for Appellants.

MORRIS, NICHOLS, ARSHT & TUNNELL,
/s/ ANDREW B. KIRKPATRICK, JR.,
Attorneys for Appellee.

Date: November 13, 1964.

Present: FORMAN and SMITH, *Circuit Judges.*

SO ORDERED, BY THE COURT

/s/ WILLIAM F. SMITH,
Circuit Judge.

SECTION 8c OF THE ACT (7 U. S. C. § 608c)

(1) The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

(2) Orders issued pursuant to this section shall be applicable only to (A) the following agricultural commodities and the products thereof (except canned or frozen grapefruit, cherries, apples, or cranberries, the products of naval stores, and the products of honeybees), or to any regional, or market classification of any such commodity or product: Milk, fruits (including filberts, almonds, pecans and walnuts but not including apples, other than apples produced in the States of Washington, Oregon, Idaho, New York, Michigan, Maryland, New Jersey, Indiana, California, Maine, Vermont, New Hampshire, Rhode Island, Massachusetts, and Connecticut, and not including fruits for canning or freezing other than olives, grapefruit, cherries, cranberries, and apples produced in the States named above except Washington, Oregon, and Idaho), tobacco, vegetables (not including vegetables, other than asparagus, for canning or freezing), hops, honeybees and naval stores as included in the Naval Stores Act and standards established thereunder (including refined or partially refined oleoresin); *Provided,* That no order issued pursuant to

this section shall be effective as to any grapefruit for canning or freezing unless the Secretary of Agriculture determines, in addition to other findings and determinations required by this chapter, that the issuance of such order is approved or favored by the processors who, during a representative period determined by the Secretary, have been engaged in canning or freezing such commodity for market and have canned or frozen for market more than 50 per centum of the total volume of such commodity canned or frozen for market during such representative period; and (B) any agricultural commodity (except honey, cotton, rice, wheat, corn, grain sorghums, oats, barley, rye, sugarcane, sugarbeets, wool, mohair, livestock, soybeans, cottonseed, flaxseed, poultry (but not excepting turkeys), eggs (but not excepting turkey hatching eggs), fruits and vegetables for canning or freezing, and apples), or any regional or market classification thereof, not subject to orders under (A) of this subdivision, but not the products (including canned or frozen commodities or products) thereof. No order issued pursuant to this section shall be effective as to cherries, apples, or cranberries for canning or freezing unless the Secretary of Agriculture determines, in addition to other required findings and determinations, that the issuance of such order is approved or favored by processors who, during a representative period determined by the Secretary, have engaged in canning or freezing such commodity for market and have frozen or canned more than 50 per centum of the total volume of the commodity to be regulated which was canned or frozen within the production area, or marketed within the marketing area, defined in such order, during such representative period. No order issued pursuant to this section shall be applicable to peanuts produced in more than one of the following production areas: the Virginia-Carolina production area, the Southeast production area, and the Southwest production area. If the Secretary determines that the declared policy of this chapter will be better achieved thereby (i) the com-

modities of the same general class and used wholly or in part for the same purposes may be combined and treated as a single commodity and (ii) the portion of an agricultural commodity devoted to or marketed for a particular use or combination of uses, may be treated as a separate agricultural commodity. All agricultural commodities and products covered hereby shall be deemed specified herein for the purposes of subsections (6) and (7) of this section.

(3) Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this chapter with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

(4) After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this chapter with respect to such commodity.

(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjust-

ments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided,* That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this subsection.

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection.

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection, for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefor from payments to producers, and (ii) for assurance of, and security for, the payment by handlers for milk purchased.

(F) Nothing contained in this subsection is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of sections 291 and 292 of this title, engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all of its sales in all markets in all use classifications, and making distribution

thereof to its producers in accordance with the contract between the association and its producers: *Provided*, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection for such milk.

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

(6) In the case of the agricultural commodities and the products thereof, other than milk and its products, specified in subsection (2) of this section orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section), no others:

(A) Limiting, or providing methods for the limitation of, the total quantity of any such commodity or product, or of any grade, size, or quality thereof, produced during any specified period or periods, which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods by all handlers thereof.

(B) Allotting, or providing methods for allotting, the amount of such commodity or product, or any grade, size, or quality thereof, which each handler may purchase from or handle on behalf of any and all producers thereof, during any specified period or periods, under a uniform rule based upon the amounts sold by such producers in such prior period as the Secretary determines to be repre-

sentative, or upon the current quantities available for sale by such producers, or both, to the end that the total quantity thereof to be purchased, or handled during any specified period or periods shall be apportioned equitably among producers.

(C) Allotting, or providing methods for allotting, the amount of any such commodity or product, or any grade, size, or quality thereof, which each handler may market in or transport to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, under a uniform rule based upon the amounts which each such handler has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity or product, or any grade, size, or quality thereof, to be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods shall be equitably apportioned among all of the handlers thereof.

(D) Determining, or providing methods for determining, the existence and extent of the surplus of any such commodity or product, or of any grade, size, or quality thereof, and providing for the control and disposition of such surplus, and for equalizing the burden of such surplus elimination or control among the producers and handlers thereof.

(E) Establishing or providing for the establishment of reserve pools of any such commodity or product, or of any grade, size, or quality thereof, and providing for the

equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein.

(F) Requiring or providing for the requirement of inspection of any such commodity or product produced during specified periods and marketed by handlers.

(G) In the case of hops and their products, in addition to, or in lieu of, the foregoing terms and conditions, orders may contain one or more of the following:

(i) Limiting, or providing methods for the limitation of, the total quantity thereof, or of any grade, type, or variety thereof, produced during any specified period or periods, which all handlers may handle in the current of or so as directly to burden, obstruct, or affect interstate or foreign commerce in hops or any product thereof.

(ii) Apportioning, or providing methods for apportioning, the total quantity of hops of the production of the then current calendar year permitted to be handled equitably among all producers in the production area to which the order applies upon the basis of one or more or a combination of the following: The total quantity of hops available or estimated will become available for market by each producer from his production during such period; the normal production of the acreage of hops operated by each producer during such period upon the basis of the number of acres of hops in production, and the average yield of that acreage during such period as the Secretary determines to be representative, with adjustments determined by the Secretary to be proper for age of plantings or abnormal conditions affecting yield; such normal production or historical record of any acreage for which data as to yield of hops are not available or

which had no yield during such period shall be determined by the Secretary on the basis of the yields of other acreage of hops of similar characteristics as to productivity, subject to adjustment as just provided for.

(iii) Allotting, or providing methods for allotting, the quantity of hops which any handler may handle so that the allotment fixed for that handler shall be limited to the quantity of hops apportioned under preceding clause (ii) to each respective producer of hops; such allotment shall constitute an allotment fixed for that handler within the meaning of subsection (5) of section 608a of this title.

(H) Providing a method for fixing the size, capacity, weight, dimensions, or pack of the container, or containers, which may be used in the packaging, transportation, sale, shipment, or handling of any fresh or dried fruits, vegetables, or tree nuts: *Provided, however,* That no action taken hereunder shall conflict with the Standard Containers Act of 1916 and the Standard Containers Act of 1928;

(I) Establishing or providing for the establishment of marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order: *Provided,* That with respect to orders applicable to cherries such projects may provide for any form of marketing promotion including paid advertising.

(7) In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

(B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers thereof only at prices filed by such handlers in the manner provided in such order.

(C) Providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their powers and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph shall be deemed to be acting in an official capacity, within the meaning of section 610(g) of this title, unless such person receives compensation for his personal services from funds of the United States. There shall be included in the membership of any agency selected to administer a marketing order applicable to grapefruit for canning or freezing one or more representatives of processors of the commodity specified in such order.

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5)-(7) of this sec-

tion and necessary to effectuate the other provisions of such order.

(8) Except as provided in subsection (9) of this section, no order issued pursuant to this section shall become effective until the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of not less than 50 per centum of the volume of the commodity or product thereof covered by such order which is produced or marketed within the production or marketing area defined in such order have signed a marketing agreement, entered into pursuant to section 608b of this title, which regulates the handling of such commodity or product in the same manner as such order, except that as to citrus fruits produced in any area producing what is known as California citrus fruits no order issued pursuant to this subsection shall become effective until the handlers of not less than 80 per centum of the volume of such commodity or product thereof covered by such order have signed such a marketing agreement: *Provided*, That no order issued pursuant to this subsection shall be effective unless the Secretary of Agriculture determines that the issuance of such order is approved or favored:

(A) By at least two-thirds of the producers who (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers), during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(B) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

(9) Any order issued pursuant to this section shall become effective in the event that, notwithstanding the refusal or failure of handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) covered by such order which is produced or marketed within the production or marketing area defined in such order to sign a marketing agreement relating to such commodity or product thereof, on which a hearing has been held, the Secretary of Agriculture determines:

(A) That the refusal or failure to sign a marketing agreement (upon which a hearing has been held) by the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) specified therein which is produced or marketed within the production or marketing area specified therein tends to prevent the effectuation of the declared policy of this chapter with respect to such commodity or product, and

(B) That the issuance of such order is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy, and is approved or favored:

(i) By at least two-thirds of the producers (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers) who, during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(ii) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

(10) No order shall be issued under this section unless it regulates the handling of the commodity or product covered thereby in the same manner as, and is made applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held. No order shall be issued under this chapter prohibiting, regulating, or restricting the advertising of any commodity or product covered thereby, nor shall any marketing agreement contain any provision prohibiting, regulating, or restricting the

advertising of any commodity or product covered by such marketing agreement.

(11) (A) No order shall be issued under this section which is applicable to all production areas or marketing areas, or both, of any commodity or product thereof unless the Secretary finds that the issuance of several orders applicable to the respective regional production areas or regional marketing areas, or both, as the case may be, of the commodity or product would not effectively carry out the declared policy of this chapter.

(B) Except in the case of milk and its products, orders issued under this section shall be limited in their application to the smallest regional production areas or regional marketing areas, or both, as the case may be, which the Secretary finds practicable, consistently with carrying out such declared policy.

(C) All orders issued under this section which are applicable to the same commodity or product thereof shall, so far as practicable, prescribe such different terms, applicable to different production areas and marketing areas, as the Secretary finds necessary to give due recognition to the differences in production and marketing of such commodity or product in such areas.

(12) Whenever, pursuant to the provisions of this section, the Secretary is required to determine the approval or disapproval of producers with respect to the issuance of any order, or any term or condition thereof, or the termination thereof, the Secretary shall consider the approval or disapproval by any cooperative association of producers, bona fide engaged in marketing the commodity or product thereof covered by such order, or in rendering services for or advancing the interests of the producers of such commodity, as the approval or disapproval of the

producers who are members of, stockholders in, or under contract with, such cooperative association of producers.

(13) (A) No order issued under subsection (9) of this section shall be applicable to any person who sells agricultural commodities or products thereof at retail in his capacity as such retailer, except to a retailer in his capacity as a retailer of milk and its products.

(B) No order issued under this chapter shall be applicable to any producer in his capacity as a producer.

(14) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order (other than a provision calling for payment of a pro rata share of expenses) shall, on conviction, be fined not less than $50 or more than $500 for each such violation, and each day during which such violation continues shall be deemed a separate violation: *Provided*, That if the court finds that a petition pursuant to subsection (15) of this section was filed and prosecuted by the defendant in good faith and not for delay, no penalty shall be imposed under this subsection for such violations as occurred between the date upon which the defendant's petition was filed with the Secretary, and the date upon which notice of the Secretary's ruling thereon was given to the defendant in accordance with regulations prescribed pursuant to subsection (15) of this section.

(15) (A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon

be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

(16) (A) The Secretary of Agriculture shall, whenever he finds that any order issued under this section, or any provision thereof, obstructs or does not tend to effectuate the declared policy of this chapter, terminate or suspend the operation of such order or such provision thereof.

(B) The Secretary shall terminate any marketing agreement entered into under section 608b of this title, or order issued under this section, at the end of the then current marketing period for such commodity, specified in such marketing agreement or order, whenever he finds that such termination is favored by a majority of the producers who, during a representative period determined by the Secretary, have been engaged in the production for market of the commodity specified in such marketing agreement or order, within the production area specified in such marketing agreement or order, or who, during such representative period, have been engaged in the production of such commodity for sale within the marketing area specified in such marketing agreement or order: *Provided*, That such majority have, during such representative period, produced for market more than 50 per centum of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or have, during such representative period, produced more than 50 per centum of the volume of such commodity sold in the marketing area specified in such marketing agreement or order, but such termination shall be effective only if announced on or before such date (prior to the end of the then current marketing period) as may be specified in such marketing agreement or order.

(C) The termination or suspension of any order or amendment thereto or provision thereof, shall not be considered an order within the meaning of this section.

(17) The provisions of this section and section 608d of this title applicable to orders shall be applicable to amendments to orders: *Provided*, That notice of a hearing upon a proposed amendment to any order issued pursuant to this section, given not less than three days prior to the date fixed for such hearing, shall be deemed due notice thereof.

(18) The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain the parity prices of such commodities. The prices which it is declared to be the policy of Congress to establish in section 602 of this title shall, for the purposes of such agreement, order, or amendment, be adjusted to reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk or its products in the marketing area to which the contemplated marketing agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 608b of this title or this section, as the case may be, that the parity prices of such commodities are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices.

(19) For the purpose of ascertaining whether the issuance of an order is approved or favored by producers or processors, as required under the applicable provisions of this chapter, the Secretary may conduct a referendum among producers or processors and in the case of an order other than an amendatory order shall do so. The requirements of approval or favor under any such provision shall be held to be complied with if, of the total number of

producers or processors, or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of the percentage required under such provision. The terms and conditions of the proposed order shall be described by the Secretary in the ballot used in the conduct of the referendum. The nature, content, or extent of such description shall not be a basis for attacking the legality of the order or any action relating thereto. Nothing in this subsection shall be construed as limiting representation by cooperative associations as provided in subsection (12) of this section.